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No. 91-1436

IN THE
*SUPREME COURT OF THE UNITED STATES*
OCTOBER TERM, 1991

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NORMAN W. SWANSON, *et al.*,
*Class A Petitioners*,

*and*

CHARLES L. BERRY, *et al.*,
*Class B Petitioners*,

V.

THE STATE OF NORTH CAROLINA, *et al.*,
*Respondents*.

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**Petition for A Writ of Certiorari to the Supreme Court of North Carolina**

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**BRIEF IN OPPOSITION**

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**Petition for A Writ of Certiorari to the Supreme Court of North Carolina**

---

**BRIEF IN OPPOSITION**

---

## STATEMENT OF THE CASE

Petitioners are a class of federal pensioners (Class A Petitioners) and a class of federal military reservists and active duty personnel (Class B Petitioners) who seek refunds for state income taxes paid on their federal pensions and military pay. Respondents are the State of North Carolina, the Secretary of the North Carolina Department of Revenue, and the State Treasurer. The State Treasurer was sued in his

official capacity, and the Secretary of Revenue was sued in both her official and individual capacities.

On March 28, 1989, this Court invalidated Michigan's laws which afforded more favorable income tax treatment to retired state employees' pensions than to retired federal employees' pensions. *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989). The majority found that this different tax treatment discriminated against federal retirees based solely on the federal source of their pensions in violation of the doctrine of intergovernmental tax immunity and the Public Salary Tax Act of 1939, 4 U.S.C. § 111.

When *Davis* was decided, North Carolina was one of twenty-three states with tax laws similar to the Michigan statutes held unconstitutional in *Davis*.[1] North Carolina

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[1] *See*, Ala. Code §§ 36-27-28 and 40-18-19 (Supp. 1988); Ariz. Rev. Stat. Ann. § 43-1022 (Supp. 1988); Ark. Code Ann. § 26-51-3026; Colo. Rev. Stat. § 39-22-104(4)(f) and (g) (Supp. 1988); Ga. Code Ann. § 48-7-27(a)(4)(A) (Supp. 1988); Iowa Code Ann. § 97A.12 (West 1984); Kan. Stat. Ann. § 74-4923(b) (1985); Ky. Rev. Stat. Ann. § 16.690 (Michie/Bobbs-Merrill Supp. 1988); La. R.S. 42545, 47:44.1 (Supp. 1989); Mich. Comp. Laws Ann. § 206.30 (1988); Miss. Code Ann. §§ 21-29-51 and 25-11-129 (1972); Mo. Rev. Stat. §§ 86.190 and 104.540 (1986); Mont. Code Ann. § 15-30-111(2) (1987); N.M. Stat. Ann. §§ 10-11-145 and 22-11-42 (1978); N.Y. Tax Law § 612(c)(3) (McKinney 1987); N.C.G.S. § 135-9 (1988); Okla. Stat. § 68-2358 (1988); Ore. Rev. Stat. § 316.680(1)(c) and (d) (1987); S.C. Code § 12-7-435(a), (d), and (e) (Supp. 1988); Utah Code Ann. § 49-1-608 (1989); Va. Code § 58.1-322(C)(3) (Supp.

exempted from state income taxation all retirement benefits of state employees and teachers but exempted only $3,000 of federal pension income. North Carolina also allowed a tax deduction to members of the North Carolina National Guard for the first $1,500 of their service pay. (N.C. Gen. Stat. § 105-134.6(b)(4) for tax year 1989; for prior tax years, N.C. Gen. Stat. § 105-141(b)(25)). No comparable benefit was conferred on federal military reservists or active duty personnel who paid North Carolina state income taxes.

Following the *Davis* decision, North Carolina equalized the tax treatment of state and federal pensions, retroactive to January 1, 1989, by repealing the tax exemption for state retirement benefits and enacting a $4,000 exclusion for the retirement benefits of both state and federal employees. (1989 N.C. Sess. Laws, ch. 792, s.1.1).[2] North Carolina also enacted a credit to be taken over a three year period for taxes paid by federal retirees on their federal pensions for tax

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1988); W.Va. Code § 11-21-12(c)(5) and (6) (Supp. 1988); and Wisc. Stat. § 71.05(1)(a) (Supp. 1988).

[2] Equalizing the tax treatment on state and federal pensions adversely impacted state retirees. Their pensions in excess of $4,000.00 were subjected to state income taxes for the first time, thus effectively reducing the value of their pensions by the State's income tax rates (6-7.75%). Not surprisingly, the equalization produced a lawsuit. That case, *Bailey v. State of North Carolina*, 330 N.C. 227, 412 S.E.2d 295 (1991), is also pending before the Court on a petition for writ of certiorari, No. 91-1434. It too involves demands for tax refunds amounting to many millions of dollars.

year 1988. (1989 N.C. Sess. Laws, ch. 984, s. 6, codified as N.C. Gen. Stat. § 105-151.20). Finally, North Carolina repealed the National Guard tax deduction, retroactive to January 1, 1990. (1989 N.C. Sess. Laws (1990 Session), ch. 1002).

On April 14, 1989, barely two weeks after *Davis* was decided, Petitioners sued Respondents (except the State of North Carolina), *inter alia*, for damages under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of North Carolina. They alleged that the State officials had unconstitutionally collected income tax on Petitioners' federal pensions and military pay. All claims for damages were subsequently dismissed, with the exception of claims against the Secretary of Revenue in her individual capacity. As to those claims, the District Court rejected the Secretary's qualified immunity defense from personal liability. The United States Court of Appeals for the Fourth Circuit reversed, holding that the individual claims against the Secretary of Revenue should also have been dismissed. *Swanson v. Powers*, 937 F.2d 965 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 871 (1992).

On March 16, 1990, Petitioners sued the Respondents in state court for tax refunds, again asserting that North Carolina had unconstitutionally collected income tax on their federal pensions and military pay. Respondents answered the complaint by denying the allegations and asserting a number of affirmative defenses, including the defenses that the *Davis* case should be applied prospectively only and that Petitioners failed to comply with the "timely notice and payment under

protest" provisions of N.C. Gen. Stat. § 105-267 -- the exclusive remedy for taxpayers seeking refunds of taxes paid under a statute later held to be unconstitutional. *See Bailey v. North Carolina*, 330 N.C. 227, 412 S.E.2d 295 (1991); *Coca Cola v. Coble*, 293 N.C. 565, 238 S.E.2d 780 (1977).

Petitioners and Respondents both moved for summary judgment. On October 3, 1990, state Superior Court Judge Samuel T. Currin granted Petitioners' motion for summary judgment, allowing refunds for the Class A Petitioners for taxable years 1985-1988 and for the Class B Petitioners for taxable years 1986-1989. On appeal to the Supreme Court of North Carolina, Respondents raised seven issues including whether *Davis* should be applied prospectively only and whether *Davis* was applicable to the National Guard tax deduction. Several state law questions were also briefed and argued, including whether Petitioners met the "timely notice and payment under protest" requirements of N.C. Gen. Stat. § 105-267, and whether an action for a tax refund could be brought as a class action.

On August 14, 1991, the Supreme Court of North Carolina reversed the trial judge and held that Petitioners were not entitled to any refund because *Davis* should be applied prospectively only. *Swanson v. North Carolina (I)*, 329 N.C. 576, 407 S.E.2d 791 (1991). The Court granted Petitioner's rehearing request and reaffirmed its initial decision on December 6, 1991. *Swanson v. North Carolina (II)*, 330 N.C. 390, 410 S.E.2d 490 (1991).

On March 4, 1992, Petitioners petitioned this Court for a writ of certiorari to review the Supreme Court of North Carolina's decisions in *Swanson (I) and (II)* on the retroactivity issue.

## REASONS WHY THE WRIT SHOULD NOT BE GRANTED

This is not a proper case for allowing the writ of certiorari. The North Carolina Supreme Court correctly applied this Court's decisions in determining that *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), should not apply retroactively and in determining that *Davis* did not invalidate the former statutory income tax exclusion for members of the North Carolina National Guard of $1,500.00 of their service pay. Moreover, Petitioners' failure to comply with valid procedural requirements constitutes an adequate and independent state law ground for denying Petitioners' request for a writ of certiorari. In short, Petitioners have not presented any grounds for the Court to accept this case for plenary review.

## I. THE PETITION SHOULD BE DENIED BECAUSE THE NORTH CAROLINA SUPREME COURT CORRECTLY DECIDED THAT THIS COURT'S DECISION IN *DAVIS v. MICHIGAN DEPARTMENT OF TREASURY*, 489 U.S. 803 (1989), SHOULD BE APPLIED PROSPECTIVELY ONLY.

### A. This Court's decision in *James B. Beam Co. v. Georgia*, 111 S. Ct. 2439 (1991), does not require the retroactive application of *Davis v. Michigan Department of Treasury*.

In its original opinion, the Supreme Court of North Carolina applied the three-pronged analysis of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), to reach its decision that *Davis v. Michigan Department of Treasury* should be applied prospectively only and rejected Petitioners' contention that *James B. Beam, Co. v. Georgia*, 111 S.Ct. 2439 (1991), required the retroactive application of *Davis*. *Swanson (I)*, 407 S.E.2d at 793-95. The North Carolina Supreme Court reasoned that because Michigan conceded that it would refund Mr. Davis' taxes if the taxation of his federal pension violated the Public Salary Tax Act, the issue of retroactive application of *Davis* was not decided in that case. Thus, the Court concluded *Beam* did not require retroactive application of *Davis*. The essence of Petitioners' argument is that the North Carolina Supreme Court misread *Beam* in concluding that the *Chevron Oil* analysis was appropriate to determine whether the *Davis* decision should be applied prospectively only.

It is Petitioners who misread *Beam*. In that case, the crucial issue was whether *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which announced a new rule of law, should apply retroactively to claims made by other litigants in cases that were not yet final when *Bacchus* was decided. The *Beam* Court held that *Bacchus* necessarily had determined that its new rule should be applied retroactively because in *Bacchus* this Court had remanded the case to state court for a determination of the proper remedy. In the opinion announcing the judgment of the Court,[3] Justice Souter concluded that:

> *Bacchus* thus applied its own rule, just as if it had reversed and remanded without further ado . . . Thus, the question is whether it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so. We hold that it is, principles of equality and *stare decisis* here prevailing over any claim based on a *Chevron Oil* analysis.

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[3] There was no opinion for the Court in *Beam*, and contrary to the Petitioners' apparent assumption, *Beam* did not overrule *Chevron Oil*. *See Beam*, 111 S. Ct. at 2449 (White, J., concurring in the judgment). Since there was no opinion for the Court, the North Carolina Supreme Court correctly followed this Court's instruction that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (citation omitted).

*Beam*, 111 S. Ct. at 2446. Concurring in the judgment, Justice White further explained that, "[t]here being no precedent in civil cases applying a new rule to the parties in the case but not to others similarly situated . . . the petitioners here should have the benefit of *Bacchus*, just as Bacchus Imports did." *Id.* at 2448-2449. The rationale and holding of *Beam* simply are not applicable in the present case because, contrary to Petitioners' assumption, this Court in *Davis* did not "apply a new rule to the parties" in that case.

The *Davis* Court never reached or determined the question of whether to apply its new rule of law retroactively or prospectively because Michigan conceded that it would give Mr. Davis a refund if this Court held that the state tax he had paid on his federal pension violated the Public Salary Tax Act or the principles of intergovernmental tax immunity. 489 U.S. at 817. As a consequence, there was no determination by this Court that must be followed under *stare decisis* principles, and no issue of "equality" in this Court's treatment of similarly situated litigants. *Beam* thus did not require the North Carolina Supreme Court to apply *Davis* retroactively. To treat *Beam* as extending to *Davis* is to read Michigan's concession in *Davis*, for whatever reason Michigan made that concession, as equivalent to a retroactivity determination by this Court. It is to read Michigan's concession as binding upon numerous other states that were not involved in the *Davis* litigation and as denying those states a valid defense to claims for hundreds of millions of dollars in tax refunds. *Beam* cannot logically or reasonably be read to extend so far.

B. The North Carolina Supreme Court correctly applied this Court's decision in *Chevron Oil* and determined that *Davis v. Michigan Department of Treasury* should be applied prospectively only.

*Chevron Oil v. Huson* remains the controlling decision setting forth the factors to be considered in deciding whether a new rule of law should be applied retroactively or prospectively only. *See Beam*, 111 S. Ct. at 2445 (Souter, J.); *id.* at 2449 (White, J., concurring in the judgment); *id.* at 2451-2452 (O'Connor, J., dissenting). This Court's decision in *Beam* affected *Chevron Oil* only in that it rejected the argument that a *Chevron Oil* analysis could be applied after this Court had already decided to apply a new rule of law retroactively. *See id.* at 2447 (Souter, J.) (by rejecting selective or "modified" prospectivity, *Beam* "[t]o this extent . . . does limit the possible applications of the *Chevron Oil* analysis"). The North Carolina Supreme Court carefully and correctly applied the *Chevron Oil* test.

> We examine initially the first prong of *Chevron*. *Davis* did not overrule a case but it was a case of first impression. The question then is whether its resolution was clearly foreshadowed. The exemption of state employees from taxation of their pensions had been in effect since 1941. This taxing scheme had received no challenge in court from anyone prior to the decision in *Davis*. Twenty-three states, including North Carolina, had similar plans. If the decision of *Davis* had

been clearly foreshadowed we do not believe so many states would have adopted such plans. The Fourth Circuit Court of Appeals said [in *Swanson v. Powers*, 937 F.2d 965 (4th Cir. 1991)] "how the intergovernmental tax immunity doctrine and 4 U.S.C. § 111 applied to North Carolina's revenue statutes was anything but clearly established prior to *Davis*." We agree with the highest courts in Virginia and South Carolina as well as the Fourth Circuit Court of Appeals that the decision of *Davis* was not clearly foreshadowed. This satisfies the first prong of *Chevron*.

As to the second prong of *Chevron* the General Assembly has repealed the provisions of our tax system at which *Davis* was aimed. The retroactive application of *Davis* will have no effect on the operation of the principle which *Davis* would advance. The second prong of *Chevron* is satisfied.

As to the third prong of *Chevron* we can take judicial notice of the fact that this State is in dire financial straits. The refund of taxes, as asked by the plaintiffs, will cost the State approximately $140,000,000.00. This would require a further increase in taxes or a further cut in services by the State. We believe the State acted reasonably under the law as it was then understood when it exempted the benefits of State pensioners from income tax and it excluded part of the pay of National Guardsmen. It would be inequitable

> to require the state to refund the taxes paid by federal pensioners and military personnel. This satisfies the third prong of *Davis*.

*Swanson (I)*, 407 S.E.2d at 794.

The North Carolina Supreme Court's application of *Chevron Oil* to the present case is, North Carolina submits, clearly correct. There is no doubt that none of the twenty-three states which taxed federal pensions while exempting state employee pensions foresaw the *Davis* decision. To the contrary, *Davis* caught the states by surprise. Thousands of federal pensioners in these states had paid state income tax on their pension income for decades without protest (since 1941 in North Carolina). There was no warning that this Court would strike a taxing scheme that had gone unchallenged for five decades and thereby cause states to become potentially liable for hundreds of millions of dollars in tax refunds. Over those fifty years only one case addressed the merits of this issue, and that case was the Michigan appellate decision which was overruled in *Davis*.

North Carolina collected the tax in good faith reliance upon a presumptively valid tax statute and spent the money providing for the public good. Federal pensioners were recipients of some of those State services. To require North Carolina to award $140,000,000.00 in tax refunds to federal pensioners will necessitate tax increases or a reduction in public services. Either action will adversely impact the well being of millions of North Carolina's citizens, many of whom are already less well off than federal pensioners. Furthermore, the constitutional harm addressed by the in-

tergovernmental immunity doctrine is discrimination against the federal government whereby its operations are infringed, rather than individual harm to federal pensioners. Thus, federal pensioners are the indirect beneficiaries of a constitutional doctrine which was not designed to protect their individual rights.

It would be inequitable to compel North Carolina, or any other state for that matter, to pay refunds to federal pensioners for a constitutional wrong that was more theoretical than real and that was not foreseeable. In such circumstances, pure prospectivity of a law-changing decision is appropriate, and the remedy to deal with the constitutional harm caused should be limited to elimination of the tax statute which offends the Constitution.

C. Petitioners' three subsidiary arguments do not have any merit.

Petitioners present three subsidiary arguments which can be readily dismissed.

First, they argue that certiorari must be granted in this case because it was granted in *Harper v. Virginia Department of Taxation*, 111 S. Ct. 2883 (1991), and *Bass v. South Carolina*, 111 S. Ct. 2881 (1991). (Petitioners' Argument I. C., p. 15). This argument ignores the posture of those cases when the writ was allowed. Certiorari was granted in *Harper* and *Bass* only to remand them for consideration in light of *Beam*, an analysis which the North Carolina Supreme Court had already performed in this case. Both *Harper* and *Bass* have now been reconsidered, and the prospective-only

application of *Davis* has been reaffirmed in each. *Accord*, *Sheehy v. Montana*, 820 P.2d 1257 (1991). This Court has not allowed certiorari in any post-*Beam* case to consider the retroactivity of *Davis*, and, therefore, it need not do so here to guarantee equal treatment among federal retirees in different states.

Second, Petitioners argue that North Carolina has applied *Davis* retroactively as to a limited group of federal pensioners and that certiorari must be granted to ensure that all the federal pensioners within the State are treated equally. (Petitioners' Argument I. B., p. 14). The argument arises out of North Carolina's early response to the unexpected decision in *Davis*. Before it was determined that *Davis* should be applied prospectively only, the Department of Revenue granted 1988 refunds to those retirees who complied with the procedural requirements of N.C. Gen. Stat. § 105-267. Retirees who did not meet the statutory requirements were accorded equal treatment by virtue of a specially enacted income tax credit enabling them to recover over a three-year period the entire amount of 1988 tax paid on their federal pensions. (1989 N.C. Sess. Laws, Ch. 984, s. 6, codified as N.C. Gen. Stat. § 105-151.20). Under a proper prospective-only application of *Davis*, the State of North Carolina was under no obligation to provide any relief whatever to its federal retirees. However, as this Court noted in *McKesson*, states may award greater relief than required under federal law. 110 S. Ct. at 2258, n. 36. That North Carolina chose to do so by allowing all of its federal retiree taxpayers to recover the 1988 taxes paid on their

federal pensions affords no basis upon which to grant the writ of certiorari.

Petitioners finally contend "that *Davis* must be applied retroactively in North Carolina, as no prepayment remedy is provided by state law." (Petitioners' Argument I. D., pp. 16-17 at 16). They have the proverbial "cart before the horse." The question of remedies, prepayment or otherwise, does not arise unless or until it is determined that a decision is to be applied retroactively.

## II. THE PETITION SHOULD BE DENIED BECAUSE THE NORTH CAROLINA SUPREME COURT CORRECTLY DECIDED THAT THE FORMER STATUTORY INCOME TAX EXCLUSION FOR NATIONAL GUARD MEMBERS WAS NOT DISCRIMINATORY TAXATION IN VIOLATION OF THE PUBLIC SALARY TAX ACT OR CONTRARY TO THIS COURT'S DECISION IN *DAVIS V. MICHIGAN DEPARTMENT OF TREASURY.*

Beginning in 1979, North Carolina excluded the first $1,500 of the pay of members of the North Carolina National Guard from state income taxation. N.C. Gen. Stat. § 105-141(b)(25). In 1989, the exclusion was replaced by a $1,500 deduction (N.C. Gen. Stat. § 105-134.6(b)(4)). This deduction was later repealed, effective on January 1, 1990. (1989 Sess. Laws (1990 Session), ch. 1002). While these tax benefits were in effect, no comparable benefit was conferred

on members of the federal armed forces who paid North Carolina state income tax.

Class B Petitioners claim that the former national guard tax benefit constitutes discriminatory taxation in violation of the Public Salary Tax Act (4 U.S.C. § 111) and is contrary to this Court's decision in *Davis*. This contention is premised on a superficial application of the *Davis* decision on the mistaken assumption that the federal government compensated federal reservists and active duty military personnel from the United States Treasury but that North Carolina National Guardsmen were paid from the State Treasury with State Funds. However, the two groups of soldiers actually are compensated from the same source -- the federal Treasury. Thus, there was no discrimination against federal officers or employees based solely on the federal source of their compensation -- the underpinning of the Public Salary Tax Act and the intergovernmental tax immunity doctrine.

In *Perpich v. Department of Defense*, 496 U.S. 334, 110 S. Ct. 2418 (1990), this Court traced the evolution of the National Guard and noted that since 1933 all persons serving in state national guard units have dual appointments, either by enlistment or commission, in both the state national guard and the National Guard of the United States. The federal government provides virtually all of the funding, materiel, and leadership for state national guard units. (110 S. Ct. at 2428). In North Carolina, State law provides for payment for national guard service from State funds only when members of the national guard are called into State service by the Governor to execute the laws, secure the safety of

persons and property, suppress riots or insurrection, repel invasions and provide disaster relief. N.C. Gen. Stat. §§ 127A-16, -105 and -106. As the Court of Appeals for the Fourth Circuit noted in *Swanson v. Powers*, 937 F.2d 965 (4th Cir. 1991), the federal government in 1989 paid 99% of the compensation for personal service disbursed to North Carolina National Guardsmen. 937 F.2d at 972-73.

Clearly, the Public Salary Tax Act was enacted to authorize states to tax federal compensation as long as the state tax does not discriminate based solely on the federal source of the compensation. The critical determinant for intergovernmental tax immunity and Public Tax Act analysis is the source of the compensation to be taxed. Since compensation paid to members of the North Carolina National Guard was paid with federal money from the federal treasury, the tax benefits formerly accorded to North Carolina National Guardsmen did not discriminate against federal reservists or active duty military personnel based on the federal source of their pay. The *Davis* decision and the Public Salary Tax Act simply do not allow one group of federal employees to manufacture a claim of discrimination based upon favored treatment provided other federally compensated employees.[4]

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[4] Even assuming arguendo that the Public Salary Tax Act and the doctrine of intergovernmental tax immunity are applicable, significant differences between the duties of members of the federal armed forces and national guardsmen justify disparate treatment. The tax benefit partly compensated national guard soldiers for remaining available for State

The Class B Petitioners have not suffered discrimination based on the federal source of their pay. The tax benefit formerly extended to North Carolina National Guardsmen did not violate the Public Salary Tax Act or the principles of intergovernmental tax immunity enunciated in the *Davis* case. Class B Petitioners' petition for a writ of certiorari on this issue should be denied.

## III. THE PETITION SHOULD BE DENIED BECAUSE PETITIONERS' CLAIMS FOR RELIEF ARE BARRED BY THEIR FAILURE TO MEET VALID STATE PROCEDURAL REQUIREMENTS.

As this Court held in *McKesson v. Florida Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S. Ct. 2238 (1990), states may fashion statutory postpayment remedies for unconstitutional taxation which require taxpayers to pay under protest or give other timely notice of complaint or to bring suit for recovery within a relatively short limitations period. *McKesson*, 110 S. Ct. at 2243, n. 4, 2254-55, and 2257. North Carolina has such a statute, N.C. Gen. Stat. § 105-267, and the Supreme Court of North Carolina has held that this statute is the exclusive means by

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emergency service when called by the Governor -- an obligation over and above their federal military service obligation and one the federal reservists and active duty military personnel did not have. The national guard tax benefit also served to attract persons interested in the military reserves to choose the North Carolina National Guard.

which taxpayers can challenge a tax as being unconstitutional. *See Bailey v. North Carolina*, 330 N.C. 227, 412 S.E.2d 295 (1991); *Coca Cola v. Coble*, 293 N.C. 565, 238 S.E.2d 780 (1977). Under N.C. Gen. Stat. § 105-267, a taxpayer challenging the constitutionality of a tax must meet several conditions precedent to suit: first, he must pay the tax and make a written demand for a refund within 30 days after payment of the tax, and second, the Secretary of Revenue must fail to award the demanded refund within 90 days after the taxpayer's demand. If these conditions precedent are met, the taxpayer must commence his action within three years after the expiration of the 90-day period. These provisions fully comport with the due process requirements articulated in *McKesson*.

The issue of whether N.C. Gen. Stat. § 105-267 barred Petitioners' refund claims was litigated, and then briefed and orally argued in the Supreme Court of North Carolina. The Court, however, did not address this issue in either *Swanson* decision. However, state procedural bars to recovery of tax refunds, including application of N.C. Gen. Stat. § 105-267, were discussed at length in *Bailey v. North Carolina*, 330 N.C. 227, 412 S.E.2d 295 (1991), a companion case decided the same day that *Swanson (II)* was handed down. In *Bailey*, state pensioners, as a class, challenged on both state and federal constitutional grounds legislative action that repealed the State pensioners' income tax exemption. The repeal was enacted to equalize treatment of state and federal pensions in the wake of the *Davis* case. The North Carolina Supreme Court held that state pensioner claims should have been dismissed for failure to meet the statutory

prerequisites of the "timely notice and payment under protest" provisions of N.C. Gen. Stat. § 105-267. Of significance was the Court's holding that when a class of taxpayers seeks to sue for a refund under N.C. Gen. Stat. § 105-267, each member must individually satisfy the conditions precedent to the suit mandated in that statute and that a class representative cannot make a blanket demand for all members of the class. *Bailey*, 412 S.E.2d at 300-03. The same procedural defects are present in the *Swanson* case, and Petitioners will not be entitled to refunds even if this Court should decide that *Davis* must be applied retroactively and remand the case. Had our Supreme Court reached the remedial issues in either *Swanson* opinion and applied N.C. Gen. Stat. § 105-267 as it did in *Bailey*, clearly there would have been an adequate and independent state law ground for denying refunds to Petitioners which fully comports with *McKesson*. *See*, Chief Justice Exum's dissent in *Swanson (II)*, where he stated that, "I take this opportunity also to say that I have real doubts as to whether plaintiffs have followed proper procedures and it may be that, ultimately, their claims will be barred on procedural grounds. *See Bailey v. State of North Carolina*." 410 S.E.2d at 495. Under these circumstances, this Court should decline to grant Petitioners' request for a writ of certiorari.

## CONCLUSION

The North Carolina Supreme Court correctly used the *Chevron Oil* analysis and arrived at the proper conclusion that *Davis* should be applied prospectively only. Further, the

former statutory income tax exclusion for National Guard members was not discriminatory taxation in violation of the Public Salary Tax Act or contrary to this Court's decision in *Davis*. In any event, Petitioners' failure to comply with North Carolina's valid and constitutional "timely notice and payment under protest" statute defeats their demands for refunds on adequate and independent State law grounds. For these reasons, Petitioners' request for a writ of certiorari should be rejected.

Respectfully submitted, this the 8th day of April, 1992.

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